

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FCC 97M-198

80195

In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area.	)	

O R D E R

Issued: December 3, 1997 ; Released: December 5, 1997

Counsel are about to embark on two weeks of deposition-taking on the West Coast. This is a ruling on Motion for Sequestration Order filed by the Wireless Telecommunications Bureau ("Bureau") on November 20, 1997. An Opposition was filed by James A. Kay, Jr. ("Kay") on December 1, 1997. An informal telephone conference was held on December 2, 1997, wherein arguments of counsel for the respective parties were heard.

The Second Circuit has praised sequestration as:

a simple and time-tested method for helping to  
discover the truth [which should] rank high in a list  
of evidentiary doctrines which courts, --- should  
enforce upon the N.L.R.B.

N.L.R.B. v. Stark, 525 F.2d 422, 427 (2d Cir. 1975), cert. denied, 424 U.S. 967 (1976). Sequestration of witnesses is found by the Commission to be appropriate where there are more than one witness testifying to the same facts. Black Television Workshop of Los Angeles, Inc., 8 F.C.C. Rcd 4192, 4195 n.20 (1993) (the trial judge could sequester party witness by prohibiting counsel from discussing a witness' testimony until after the party witness had testified). The same concerns for preserving unaltered testimony is recognized for depositions. See Naismith v. Professional Golfers' Association, 85 F.R.D. 552, 567-568 (N.D. Ga. 1979) (FRE 615 applies to depositions and good cause shown for ordering that no witness discuss his/her own or other witnesses' depositions with anyone). See also Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (cited by Kay as only authority found for court ordered sequestration of a party in depositions).<sup>1</sup> Also, the Commission has made a distinction between civil litigation and Commission adjudicative

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<sup>1</sup> Kay argues that the Galella case is distinguished because there was a pre-existing TRO against harassment which had been violated. While there is no precise parallel situation here, there has been a request made for protection from harassment. In any event, the imposition of sequestration remains one of discretion and there need be no showing of good cause.

hearings where the personal participation of parties is not essential to the "effective advocacy of the cause." Black Television of Los Angeles, Inc., supra.

Because of the need for precise adjudicative fact-finding in this case, there is a corresponding need for the best possible recollection of witnesses without any confusion, inhibition or distraction. One witness has already sought a protective order from possible harassing questions from Kay's attorneys. See Order FCC 97M-195, released November 26, 1997 (the broad protection requested was refused but it is significant to a sequestration ruling that a deposition witness feels intimidated). Also, another witness, Mark Sobel ("Sobel"), was found in Judge Frysiak's Initial Decision to have unlawfully transferred de facto control to Kay of the operations of stations that were licensed by the Commission to Sobel. Marc Sobel, 97D-13, released November 28, 1997.<sup>2</sup> Therefore, there is a need that Sobel, who was found not to be independent of Kay, be sequestered in this case from Kay (and vice-versa) at all testimonial stages of this case, including depositions and between deposition discovery and the hearing. See Naismith v. Professional Golfers Association, supra.

It is noted that when the Bureau's Motion For Sequestration Order was filed, it was represented to the Bureau that Kay would probably not be available to participate in depositions on December 9-10. Therefore, the respective counsel agreed to take Kay's deposition at the earliest subsequent time which would be December 11-12. If Kay was unavailable on December 9-10, the sequestration concerns on that date would be moot because Kay could not be present and counsel had agreed to take the depositions of other witnesses on those two days of Kay's unavailability.<sup>3</sup> In the telephonic conference of December 2, 1997, it was reported by Kay's counsel that Kay now realized that he would be available for the depositions of December 9-10 or could be deposed himself on those days. But the witnesses for December 9-10 were already under subpoena and the Bureau, correctly, did not want to risk changing the schedule.

Kay's counsel has indicated that Kay wants to attend all sessions or should be advised of the testimony in depositions at which he is not present, including those scheduled for December 9-10. Sequestration will apply to all parties and to all witnesses. L.S.Ayres & Co. v. N.L.R.B., 551 F.2d 586, 587 (4th Cir. 1977) (sequestration is a discretionary decision of a presiding

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<sup>2</sup> Kay participated in the Sobel case as an intervenor party. Kay's counsel refers to that case as an example of Kay being permitted to be present at Sobel's deposition. But in that case the Bureau objected when Kay arrived at the deposition and Judge Frysiak was unavailable to make a telephonic ruling. It was in the interest of timely completion of the deposition that the Bureau waived suspending the deposition in order to obtain a ruling from the Judge. In this case, the Bureau has filed a timely written motion asking for sequestration. Here, there is time to rule before the depositions commence on December 9, 1997, in Los Angeles. The situation is entirely different from the situation in the Sobel deposition.

<sup>3</sup> Following the two depositions that Kay could not attend, Kay's deposition would be taken on December 11-12. With his deposition being completed, Kay would be permitted to attend the remaining depositions.

administrative law judge). Therefore, counsel for both parties should be informed of the scope of disclosures that can be made in connection with preparing respective witnesses for testimony. The Presiding Judge has determined that sequestration of witnesses is in the best interest of this case because of the myriad substantial issues of fact to be determined. The authorities cited above are relied on for imposing sequestration, as well as the discretion delegated to Presiding Judges to regulate the course of Commission hearings. Van Buren Community Services, 87 F.C.C. 2d 1018, 1020 (Review Bd 1981). See also Discovery Procedures, 11 F.C.C. 2d 185 (1968).

The scope of meaningful sequestration requires that Kay not attend any depositions until after he has been deposed. Where counsel for Kay attend depositions which precede Kay's, counsel shall disclose to Kay before Kay is deposed, only the substance of the issues covered. There may be no communication by counsel to Kay of questions asked of prior witnesses, the answers given, or of the substance of the deposition testimony until after Kay has been deposed. The same restrictions apply to all witnesses who are deposed, including the Bureau's witnesses. These restrictions are deemed necessary to carry out the letter and spirit of effective sequestration.

#### Rulings

Accordingly, IT IS ORDERED that the Wireless Telecommunications Bureau's Motion For Sequestration Order filed on November 20, 1997, IS GRANTED and the procedures for implementing sequestration specified above SHALL APPLY TO ALL PARTIES AND TO ALL WITNESSES.

IT IS FURTHER ORDERED that no party or witness may attend any deposition that takes place prior to the scheduled deposition of that witness.

IT IS FURTHER ORDERED that no party, witness or counsel may discuss the substance of any question or answer that was asked at a deposition with a witness until after that witness has been deposed.<sup>4</sup>

IT IS FURTHER ORDERED that the parties and their respective counsel SHALL ENSURE that neither Kay nor Sobel, nor agents of Kay or Sobel, discuss with any other witness her or his own deposition or any other deposition taken in this case without further order of the Presiding Judge.<sup>5</sup>

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<sup>4</sup> A witness may only be advised of the substance of the issues covered in previous depositions before that witness gives a deposition.

<sup>5</sup> This restriction, specifically directed to Kay and Sobel because of prior business relationships, is in the nature of a protective order. 47 C.F.R. §1.315(c). Cf. Naismith v. Professional Golfers Association, *supra*, 85 F.R.D. at 568. There the court imposed a similar restriction because without it the witnesses could share their depositions in order to make their testimony more consistent at trial. *Id.* Also recognized is the salient effect depositions have of locking-in testimony before a trial or hearing so that any material variation raises serious questions of credibility. *Id.*

IT IS FURTHER ORDERED that a copy of this Order shall be furnished to each witness who appears for deposition.

FEDERAL COMMUNICATIONS COMMISSION<sup>6</sup>

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" being more prominent.

Richard L. Sippel  
Administrative Law Judge

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<sup>6</sup> Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.